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(TX STATE BAR NO. 9933500)
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LOBEL FINANCIAL CORPORATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

RONALD MENDLESKI
Plaintiff,

vs.

LOBEL FINANCIAL
CORPORATION, RYAN
PECK DBA SUPERIOR
AUTO RECOVERY, and
BURNS NATIONAL , LLC,

Defendants.

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CASE NO: 4:17-CV-1443

MOTION TO DISMISS

NOW COMES THE DEFENDANT LOBEL FINANCIAL CORPORATION (“LOBEL”) and pursuant to F.R.C.P. 12(b) (6) moves to dismiss the Plaintiff’s action against it because this Court lacks jurisdiction over this Defendant under the Federal Fair Debt Collection Practices Act. DEFENDANT LOBEL is not a “debt collector” as that term is defined in the Statute.

ORIGINAL ANSWER

Subject to and without waiving its Motion to Dismiss, DEFENDANT LOBEL submits the following Answer to the allegations in the Plaintiff’s First Amended Complaint:

1. DEFENDANT LOBEL admits the allegations in paragraph 1.
2. DEFENDANT LOBEL admits the allegation in the first sentence of paragraph 2 that it hired defendant Burns as its agent to repossess plaintiff's vehicle, but lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations and therefore denies the same.
3. DEFENDANT LOBEL admits the allegation in the first sentence of paragraph 3.
DEFENDANT LOBEL denies the remaining allegations.
4. DEFENDANT LOBEL admits the allegation in the first sentence of paragraph 4.
DEFENDANT LOBEL denies the remaining allegations.
5. DEFENDANT LOBEL denies the allegations in paragraph 5.
6. DEFENDANT LOBEL lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6, and therefore denies the same.
7. DEFENDANT LOBEL lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7, and therefore denies the same.

Jurisdiction and Venue

8. In response to the allegations in paragraph 8, DEFENDANT LOBEL denies that it is a "debt collector" as that term is defined in the Federal Fair Debt Collection Practices Act and therefore denies that this Court has jurisdiction to litigate claims which may be asserted against it under the Federal Statute. 28 U.S.C. 1367 gives this Court supplemental jurisdiction over state law claims asserted against Defendants who are governed by the Federal Statute and over which this Court has federal jurisdiction.
DEFENDANT LOBEL denies that this Court has supplemental jurisdiction over the state law claims asserted against it since this Court does not have federal jurisdiction over it

under the Federal Fair Debt Collection Practices Act.

9. In response to the allegations in paragraph 9, DEFENDANT LOBEL admits venue is proper in the Southern District of Texas, but denies that it is subject to the personal jurisdiction of this Court for the reasons set forth above.

Parties

10. DEFENDANT LOBEL admits the allegation in paragraph 10.
11. DEFENDANT LOBEL lacks knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 11 and therefore denies the same.
12. DEFENDANT LOBEL admits the allegation in paragraph 12.
13. DEFENDANT LOBEL admits the allegation in paragraph 13.
14. DEFENDANT LOBEL denies the allegations in paragraph 14.

First Alleged Cause of Action

15. DEFENDANT LOBEL realleges and incorporates herein by reference the allegations of all of its responses and answers set forth above.
16. DEFENDANT LOBEL admits the Plaintiff is a consumer who owed a debt.

DEFENDANT LOBEL denies that it is a “debt collector” as defined at 15 U.S.C. § 1692a(6) (2011) and denies the remaining allegations in paragraph 16.
17. DEFENDANT LOBEL denies the allegations in paragraph 17.
18. DEFENDANT LOBEL denies the allegations in paragraph 18.
19. DEFENDANT LOBEL denies the allegations in paragraph 19.
20. DEFENDANT LOBEL denies the allegations in paragraph 20.
21. DEFENDANT LOBEL denies the allegations in paragraph 21.

Second Alleged Cause of Action

22. DEFENDANT LOBEL realleges and incorporates herein by reference the allegations of all of its responses and answers set forth above.
23. DEFENDANT LOBEL denies the allegations in paragraph 23.
24. DEFENDANT LOBEL denies the allegations in paragraph 24.
25. DEFENDANT LOBEL denies the allegations in paragraph 25.
26. DEFENDANT LOBEL denies the allegations in paragraph 26.
27. DEFENDANT LOBEL denies the allegations in paragraph 27.

Third Alleged Cause of Action

28. DEFENDANT LOBEL realleges and incorporates herein by reference the allegations of all of its responses and answers set forth above.
29. DEFENDANT LOBEL admits the allegation in the first sentence of paragraph 29.
DEFENDANT LOBEL denies the remaining allegations in said paragraph.
30. DEFENDANT LOBEL admits the allegation in the first sentence of paragraph 30.
DEFENDANT LOBEL denies the remaining allegations in said paragraph.
31. DEFENDANT LOBEL admits the allegation in the first sentence of paragraph 31.
DEFENDANT LOBEL denies the remaining allegations in said paragraph.
32. DEFENDANT LOBEL denies the allegations in paragraph 32.
33. DEFENDANT LOBEL denies the allegations in paragraph 33.

Fourth Alleged Cause of Action

34. DEFENDANT LOBEL realleges and incorporates herein by reference the allegations of all of its responses and answers set forth above.

35. DEFENDANT LOBEL denies the allegations in paragraph 35.

36. DEFENDANT LOBEL denies the allegations in paragraph 36.

37. DEFENDANT LOBEL denies the allegations in paragraph 37.

AFFIRMATIVE DEFENSES

38. DEFENDANT LOBEL pleads that it is NOT a “debt collector” under the Federal Fair Debt Collection Practices Act and therefore that this Court lacks jurisdiction over it in this case both as to Federal claims under said Statute as well as any State law claims under Texas law.

39. DEFENDANT LOBEL pleads “substantial compliance” with the provisions of the Texas Business & Commerce Code entitled “Explanation of Calculation of Surplus or Deficiency.” T.B.&C.C. Section 9.616(d) states that language in a contract which substantially complies with the statutory requirements is acceptable. Section 9.616(d) specifically states as follows: “A particular phrasing of the explanation is not required. An explanation complying substantially with the requirements of Subsection (a) is sufficient even if it includes minor errors that are not seriously misleading.” The contract in question substantially complies with the disclosure requirements of the statute. The Plaintiff’s complaint about the “order” of the disclosures insists upon a strict construction of the statute which is not required and therefore cannot serve as the basis for any damages or penalties under the statute.

40. DEFENDANT LOBEL pleads “Offset.” The Plaintiff was admittedly delinquent on his account and the deficiency due to DEFENDANT LOBEL, along with interest, the cost of repossession and attorneys fees for the Plaintiff’s breach of contract, should be used to offset any alleged penalties or damages or attorneys fees assessed against DEFENDANT LOBEL, if any.

41. Finally, DEFENDANT LOBEL pleads that all conditions precedent to the foreclosure of its security interest in the Plaintiff's vehicle were performed or occurred prior to the repossession and sale. See, F.R.C.P. 9(c).

PRAYER

WHEREFORE, PREMISES CONSIDERED, DEFENDANT LOBEL prays that the case against it be dismissed for lack of jurisdiction, and that it recover its costs; DEFENDANT LOBEL further prays that the Plaintiff take nothing by this action, and that DEFENDANT LOBEL recover its costs, and attorneys fees, and further prays for such other and further relief, either at law or in equity to which it may be justly entitled.

DATED: JUNE 13, 2017

RESPECTFULLY SUBMITTED,

BY: Ronald E. Holub

RONALD E. HOLUB, ESQ.

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LOBEL FINANCIAL CORPORATION

CERTIFICATE OF SERVICE

The Undersigned hereby certifies that a true copy of the foregoing Motion to Dismiss, and subject thereto, Original Answer filed by DEFENDANT LOBEL FINANCIAL CORPORATION will be transmitted electronically on this date along with a Notice of Electronic Filing to Plaintiff's attorney Alexander B. Trueblood at alec@hush.com.

/S/ Ronald E. Holub